No. 11902.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FEDERAL STEVEDORE COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, U. S. Employees' Compensation Commission,

Appellee.

APPELLANTS' OPENING BRIEF.

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vs.

WARREN H. PILLSBURY, Deputy Commissioner, U. S. Employees' Compensation Commission,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

One Walter Olcott, while working as a longshoreman in the employ of the Freeman Steamship Company, sustained injuries while working in said capacity upon navigable waters of the United States in San Diego County, California, on November 6, 1944, and as a result of the injuries, died on November 12, 1944. A woman giving her name as Mrs. Cora E. Olcott and claiming to be the surviving wife of Walter Olcott filed a claim for compensation arising out of the death of Walter Olcott with the United States Employees' Compensation Commission, in the office of Deputy Commissioner Warren H. Pillsbury, District 13, on February 15, 1945. [Ap. 58.] After hearings and investigation conducted by the

deputy commissioner, a compensation order awarding a death benefit was made and entered in the office of the said deputy commissioner on the 18th day of February, 1946. [Ap. 174-175.]

On March 5, 1946, appellants (libelants in the court below) filed a Libel for an Injunction in the United States District Court, Southern District of California, Southern Division, contending that the award was not in accordance with law. Said Libel was filed in the court below pursuant to the Longshoremen's and Harbor Worker's Compensation Act which provides that, "If not in accordance with law, a compensation order may be suspended or set aside in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the federal district court for the judicial district in which the injury occurred . . ." (Act of Mar. 4, 1927, c. 509, sec. 21, 44 Stat. 1436, as amended June 26, 1936, c. 804, 49 Stat. 1921, 33 U. S. C. A. 921.)

On January 7, 1948, the Honorable Paul J. McCormick entered a final decree denying any relief and dismissing the libel with costs. [Ap. 224.]

Petition for Appeal was filed March 18, 1948 [Ap. 225]; Assignments of Error were filed March 18, 1948 [Ap. 225-227]; Order Allowing Appeal was filed March 18, 1948 [Ap. 228]; Notice of Appeal was filed March 18, 1948 and copy mailed to proctor for respondent on

the same date [Ap. 229]; Bond on Appeal was approved and filed March 18, 1948 [Ap. 233]; and Praecipe for Apostles on Appeal was served and filed March 22, 1948. [Ap. 234-235.]

Jurisdiction of civil causes of admiralty and maritime jurisdiction is vested in the courts of the United States by Article III, Section 2, of the Constitution of the United States, to-wit: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.

An appeal from a final decree in admiralty is authorized by Section 128a of the Judicial Code (43 Stat. at L. 936, 28 U. S. C. A. Sec. 225, which provides that a Circuit Court of Appeals shall have appellate jurisdiction to review final decisions).

Statement of the Case.

In the claim for death benefit the claimant alleged that she was married to Walter Olcott on the 26th day of August, 1936, at Tijuana, Mexico by a judge of the First Instance. The basic controversy involved in this case of whether the claimant was the surviving wife of Walter Olcott. The claimant was unable to produce any documentary evidence of any marriage of any kind or character. The sum and substance of all of the evidence introduced by the claimant at the hearings before the deputy commissioner was her conclusion that she was married to Walter Olcott by a preacher in Tijuana, Mexico on August 26, 1926.

The appellants contended in the court below that (a) whether the claimant was or was not the surviving wife of Walter Olcott was a jurisdictional and basic fact which entitled appellants to a trial *de novo* with reference to said jurisdictional fact in the court below; (b) that there was no substantial evidence before the deputy commissioner sufficient to support his finding that the claimant was the surviving wife of Walter Olcott; (c) that appellants were deprived of their property by the compensation order, without due process of law as guaranteed by the 5th Amendment to the Constitution of the United States "because the deputy commissioner refused to compel the applicant to sustain the burden of proving a legal marriage according to the law of Mexico and upon the several and distinct ground that the deputy commissioner refused to consider the question whether a purported marriage may or may not have been valid or may or may not have been invalid." [Ap. 201-207; 218-221; 226-227.]

The questions involved are raised by the Assignments of Error [Ap 226-227] and the adopting by appellants "as their points on appeal of said Assignments of Error appearing in the transcript of the record in this case." [Ap. 261.]

Specification of Errors Relied Upon.

Appellants rely upon Assignments of Error I, II, III, IV, V, VI, VII, VIII, IX and X. [Ap. 226-227.]

ARGUMENT.

POINT I.

The District Court Erred in Denying Libelants' Motion for a Trial De Novo of the Question Whether "Cora Olcott" Is the Surviving Wife of Walter Olcott.

The Act of March 4, 1927, c. 509, sec. 9, 44 Stat. 1429, as amended, 33 U. S. C. A. 909, provides, in so far as it is pertinent to this appeal, as follows:

> "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: . . . (b) If there be a surviving wife . . ., to such wife . . . 35 per centum of the average wages of the deceased, during widowhood, or dependent widowhood, with two years compensation in one sum upon remarriage . . ."

Appellants contend that in a case such as this there are at least three basic and jurisdictional facts:

(a) The deceased must have been an employee of the person proceeded against;

(b) The injury causing death must have been sustained on navigable waters; and

(c) There must be a surviving wife.

The existence of an actual surviving wife is an essential jurisdictional fact in that the deputy commissioner has no authority or power to make a compensation order in favor of any woman unless she is a surviving wife. The statute providing for a death benefit is cast in contingent language. It states that if there be a surviving

wife then and only then may a compensation order be made.

In *Crowell v. Benson,* 285 U. S. 22, 56, the Court said:

> "In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that *relation* is the *pivot* of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault on his part, to the liability which the statute creates." (Emphasis added.)

In the *Crowell* case the trial court concluded that whether or not the injured man was an employee of Benson was a jurisdictional fact. The Circuit Court of Appeals affirmed the District Court and the Supreme Court affirmed the Circuit Court of Appeals.

The same principle applies in the case at bar. It was the contention of the appellee in the court below that the United States Supreme Court held in the *Crowell* case that there were only two jurisdictional facts involved in these compensation cases and that such jurisdictional facts consisted of the relationship of master and servant and the requirement that the injury be sustained upon navigable waters of the United States. The Supreme Court did not say, and never has said, that there are only two

jurisdictional facts which could be involved in any longshoreman and harbor worker case. The important proposition involved in the *Crowell* case and which appellants contend is a vital question here is the necessity of the existence of a particular status in so far as the specific claimant is concerned. In a case involving only an injury the jurisdictional relationship is that of master and servant. In a claim for a death benefit the controlling relationship is whether the woman is actually a surviving wife and therefore the appellants were entitled to a trial *de novo* on this issue. Appellants made a specific motion for a trial *de novo* with reference to this jurisdictional fact. [Ap. 210-211.] The pertinent part of the motion is as follows:

> "Come now the libelants, Freeman Steamship Company, a corporation, and Fireman's Fund Insurance Company, a corporation, and move the Court for a trial *de novo* on the jurisdictional and basic fact whether claimant, known as Cora E. Olcott, was actually married to Walter Olcott and was and is the surviving wife of said Walter Olcott, upon the ground that the relationship, if any, of the claimant to the deceased Walter Olcott was and is a jurisdictional and basic fact." [Ap. 210.]

The motion was denied as follows:

> "Upon consideration of libelants' motion for a trial *de novo,* and a correlated motion by libelants to set case for trial in this court, and upon consideration of the memoranda of respective proctors, each motion of libelants is denied. Exceptions allowed libelants." [Ap. 224.]

POINT II.

The District Court Erred in Ruling That the Compensation Order Dated February 16, 1946, Is Factually and Legally Supported and Is in All Respects in Accordance With Law.

A consideration of this particular point involves Assignments of Error III, IV, V, VI and IX.

The evidence with reference to whether or not the claimant was the surviving wife of Walter Olcott is as follows:

(A) Claimant's testimony before the deputy commissioner:

> I was married to Walter Olcott on August 26, 1926, at Tijuana, Mexico. [Ap. 8.]
>
> I have no marriage certificate or certified copy of a marriage certificate. I don't remember very much about where in Tijuana I was married. It was someplace like they had in Yuma, some preacher, as I understand it. I stated that I was married in Tijuana on August 26, 1926. That is the only time he (Walter Olcott) was off from his work. I don't know where in Tijuana I was married. [Ap. 9.]
>
> I was there when the ceremony was performed. Some Spanish fellow and his wife were present. I don't know them. I did not know who they were. I was introduced to them at the ceremony, as a witness. I had never seen them before. They were acquaintances of Mr. Olcott. After I was married I obtained a paper, a certificate like my first marriage, from the person performing the ceremony. It was in English

and Spanish. Our names were written in English. [Ap. 10-11.]

I did not personally file any application for a marriage certificate. We got the papers down there where we went to get married. [Ap. 13.]

I did not make any application for a license. [Ap. 15.]

(B) Testimony of John Roberts:

I knew Mr. Olcott very well, 19 or 20 years. We were intimate friends. Walter Olcott said to me "I didn't get married by a priest. We got married by a preacher." He took the *license* out of his pocket. I saw it was a marriage *license*. It was in Spanish. [Ap. 18.]

The paper looked like an official paper. "It was a license. There was 'Licencia,' there; I saw that. And of course, 'Licencia,' in Spanish, is 'License,' in English." [Ap. 19-20.]

Appellants have not referred to the testimony with reference to the fact that Walter Olcott and the claimant lived together as husband and wife for the reason that common law marriages have not been legal in California since long before 1926.

Other evidence in the record of the proceedings before the deputy commissioner with reference to whether there was or was not a marriage between claimant and Walter Olcott in Tijuana, Mexico on August 26, 1926 is as follows:

(A) Jesus Ruiz testified as follows:

I live in Tijuana. I am a lawyer admitted to practice in Mexico. I am a graduate of the School of Law of the State of Chiapas and also the Free School of Law of Mexico City. I have held official positions. In my State after I was admitted to practice I served as Attorney General of Justice of the State of Chiapas. I am admitted to practice in all the courts of the Republic of Mexico. [Ap. 19-20.]

Records are kept in Tijuana of the marriages performed during the year 1926. Those records are kept in the office of the Judge of the Civil Registrar. None of the records maintained in Tijuana have ever been destroyed since 1925; I have been there all those years myself. [Ap. 22-23.] Since 1917, up until 1932 the laws in effect were the laws of domestic relations, and in accordance with the law there was, as there is now, one official of the Civil Register. He is the Judge of the Civil Register, and that official is the one who performs all marriage ceremonies.

The requirements of Mexican law with reference to filing of an application for marriage in Tijuana at that time (1917 until 1932) were: There must be filed a petition to the official of the Civil Registry, a written application, and that application must be signed by the man and by the woman who wish to marry. It must also be signed by the father and mother of both contracting parties in case they are alive, and by two witnesses for both parties, who have known them for three years before the marriage. In that condition it should be expressed the name of the bride and the groom. The names of the father

and mother of each one of them should also be stated, where they lived, what was the occupation, their age, and the oath of their being no impediment to the marriage. The question of residence was taken very much into consideration, because only those could marry whose domicile was that of the official registrar.

There was only one person in Tijuana in 1926 who could solemnize a marriage. There is only one in each population in accordance with the law, and there was only one in Tijuana at that time. A judge of the civil court could not perform a marriage ceremony. Neither the Mayor of the town nor any other public officer could perform a marriage ceremony. In places where there is an official of the civil register, nobody else can perform the ceremony. Since 1884 up to date neither a priest nor minister of the gospel could perform a marriage in Lower California.

There was no such thing as a religious marriage. That is prohibited. It must first be a civil marriage and priests cannot marry two persons unless they bring a certificate of marriage of the civil registry.

I am sure there was a judge of the civil registry in Tijuana in August of 1926.

Applications are recorded because the procedure is as follows: The petition is filed; the judge calls on each of the persons who have signed an application, one at a time, in order that they may say whether or not that which is written is true. When the applications are presented to the judge, he calls them all in to ratify it. Then after ratifying the applica-

tion he fixes a time within eight days, and then when they are all present again he asks those who are to be married if they ratify their applications still, and if they still wish to be married, he then declares them to be married in the name of the law and in the name of society, and all that procedure is thereupon recorded in a book. There is a record made, written in a special book and in that book the married persons sign and the witnesses sign and all those who were present sign. The book is called the Book of Registry of Marriages, and that is kept in such manner. [Ap. 22-27.]

Of my own knowledge, with reference to the accuracy and the completeness of the records of marriages in Tijuana in 1926, the marriages legally held are properly registered or recorded, and in those records is shown the truth of what was done. [Ap. 28.] The residence requirements for a valid marriage in Tijuana in 1926, have always been, according to the Civil Code, six months of actual residence by both parties. [Ap. 28-29.]

There were no marriages by proxy in 1926. They did not do it in 1926 because Americans could come across the line and the judge of the civil registry was permitted to marry them by a special dispensation of the Governor of the State. All of those marriages, in cases of Americans going across the border in 1926 and becoming married, necessarily appear in the registry of civil status. [Ap. 30-31.] There was no way for an American going across the line to Tijuana and going through what they believed to be a marriage ceremony and getting something

which looks like a certificate and yet there not being a valid marriage recorded on the register of civil status; that was not the practice in 1926. At that time there were no proxy marriages. They were married legally; there was no necessity for them to commit that crime. [Ap. 33.]

At that time there were no marriages by proxies in Chihuahua. The law in Chihuahua with reference to marriages came into effect about a year and a half or two years ago. [Ap. 36.] I found the record for 1926 in order and well kept.

There is no likelihood, in the case of Americans going across the border to be married in Tijuana in 1926 or later, that the ceremony would be performed and the papers would be filled out and that for any reason they would then not be recorded because they have to sign the record. The record of the procedure is written in longhand in a bound book, the pages of which are numbered on both sides, and you cannot extract the leaves from the book, and at the conclusion of the ceremony the book must be signed at the foot of the written procedure. [Ap. 37.] The marriage record is right in the book at the time of the solemnizing of the marriage. That is, the performing of the ceremony, the solemnizing of the marriage, is all entered in the book and the signing of the book. That is what we call the solemnizing of the marriage. Without that record being signed there is no marriage. [Ap. 37-38.]

"Q. I am not speaking of the validity of what they do. Here when the ceremony is performed the papers are signed by the person performing the cere-

mony and they are then sent over to the county clerk's office to be recorded. Is there any practice like that in Tijuana for marriages? A. No. The judge who marries anyone in Tijuana has his book and writes it in the book.

"Q. At the time? A. At the time of performing the marriage." [Ap. 38.]

At the time the lady sitting here at the counsel table, Mrs. Olcott, came and met me at the marriage registry three or four months ago, she told me the name of the two for whom I searched the record. That is necessary because in the margin of the record the names of the married parties appear. When I looked up the index or the document for Mrs. Olcott she wrote on a small piece of paper the name of the man and her name, and I took the paper. She said, "Here are the names." I then went away and looked for the record. I looked under similar names, as well as the names which she gave me, at the office of the civil registrar, and the clerk there joined with me and we looked together. I looked for two years before 1926 and the year 1926 and two years after; five years altogether we looked. I also asked the lady if she remembered in what building she had been married, and if it was on the lower floor or upstairs. She could not explain to me how she got married. In 1926 there was no such thing as a common law marriage in Mexico, prior to 1917 there was such a law. [Ap. 38-39.]

(Note: The claimant testified that she gave Mr. Ruiz her maiden name and Mr. Olcott's to look up in the marriage book and records. [Ap. 40-41.])

Mr. Ruiz also testified: "She gave me two names, but I don't remember them because they are in English. I personally went to look for them, because I saw she was very much interested and I personally went through the books and I could not find the marriage record. I made my search page by page, entry by entry. [Ap. 24.]

(B) The deputy commissioner conducted an independent investigation by inquiring of independent and impartial sources. On October 3, 1945 the deputy commissioner addressed a letter to the Consulate of Mexico at San Francisco, California outlining the issue with reference to whether or not the claimant was ever married to Walter Olcott and the second, third and fourth paragraphs digested the state of the record of the proceedings before the commissioner as it then existed. He then stated as follows:

"Several questions arise upon which I would appreciate any help that can be obtained from an impartial and authoritative source such as yourself or the Consulate to assist in determining as follows:

"(1) Are the records of marriages at Tijuana for a period including the year 1926 carefully, completely and accurately kept.

"(2) Upon the information stated above, is it possible or impossible that Mr. and Mrs. Olcott may have been validly married at Tijuana, notwithstanding the absence of an official record as testified to.

"(3) If you should happen to be in Tijuana in the near future as you indicate, would you be able to look through the records for that year and see what you can discover.

"(4) Is it possible, notwithstanding the absence of such record that Mr. and Mrs. Olcott may have been colorably married at Tijuana, *i. e.*, that they might have appeared before some person who might by argument be supposed to have some authority even though such authority does not now appear with complete validity.

"(5) How can one reconcile the so relatively large number of Americans going across the Border to Mexican towns such as Tijuana and returning with purported marriage certificates and believing themselves to be married, on the one hand, with an indicated much smaller number of cases in which records of such marriage are found in the legal register of marriages.

"It seems to be a matter of common knowledge that more American couples go through some form of ceremony across the Border, are given some form of certificate and return in the belief that a marriage has been performed, than Mexican law as to residence requirements, etc., would permit to be married with entries in the register of marriages performed by proper authority.

"Thanking you for any help you can give me in determining the real facts and probabilities of the case, I remain

"Yours very truly,

"Warren H. Pillsbury,
"Deputy Commissioner
"13th Compensation District.

"P.S. If a search should be made of the records, the information I have is that it was asserted to have been performed on August 26, 1926. Name of the husband was Walter Olcott. Mrs. Olcott states

she was married under her maiden name of Cora Kinzer Hartshorn and search might be made under the name of Cora Hartshorn. WHP." [Ap. 43-45.]

In answer to this letter Mr. Ballesteros wrote on November 9, 1945, as follows:

"Mario Ballesteros, 'Edificio Lelevier,' Ensenada, Baya California, Mexico.

"November 9, 1945.

"United States Employees' Compensation Commission, Thirteenth Compensation District, 417 Market Street, Room 318, San Francisco, California. Attention: Mr. Warren H. Pillsbury, Deputy Commissioner. File: Walter Olcott, 1017-42.

"Gentlemen:

"1. I have thoroughly checked the records of marriages at the Civil Register Office at Tijuana, Lower California, Mexico, and I have found that said marriages for a period of 31 years, including the year 1926, are carefully, completely, and accurately kept, as well as legally maintained.

"2. and 3. When I examined said records as stated above, I found that there was no records of marriage of Mr. and Mrs. Walter Olcott on August 26, 1926, or for any time during the year of 1926.

"3. According to article 46 of the Civil Code then in effect, which is worded as follows: 'The civil status of persons can only be proved by the respective entries in the register. No other document nor method of proof is admissible to prove the civil status, except in the cases provided for by articles 45 and 358.' (Art. 45: 'When no registers have existed, or they have been lost or destroyed, or effaced, or some of

the leaves are missing on which it might be supposes (*sic*) the records was made, proof of the fact or act by means of instruments or witnesses may be received, but if one of the registers has been rendered useless and the duplicate exists, the proof shall be taken from the latter, without admitting any other class of proof (*sic*).' And art. 358: 'In the cases of abduction or violation, when the time of the offense coincides with the conception, the tribunals may, at the instance of the interested parties, declare the paternity.); from the information stated above, it is impossible that Mr. and Mrs. Olcott were validly married at Tijuana. The Civil Register Offices have been in existence in Tijuana and instituted since 1914, and in this particular case, the records having not destroyed or effaced, and since none of the leaves are missing on which it might be supposed the record was made, and since therefore, no proof of the fact or act by means of instruments or witnesses may be received; and there being a duplicate book of the register which does not contain any record of such marriage, it is impossible that Mr. and Mrs. Olcott could have been legally or colorably married in Tijuana. They might have appeared before some person, but without any authority to perform marriages.

"5. The number of purported marriages by American citizens in Tijuana is not as large as commonly believed. The purported marriages which are supposed to have been performed in Tijuana, of which records no exists, are, without doubt, done by the parties for their own convenience or for other illegal purposes.

"Also, when I examined said records as stated above, I found that there was no records of marriage under Mrs. Olcott's maiden name of Cora Kinzer

Hartshorn on August 26, 1926, or for any time during the year of 1926.

"Wishing that this information will be complete as requested, I remain

"Yours very truly,

"/s/ MARIO BALLESTEROS."

[Ap. 45-48.]

On December 5, 1945, the deputy commissioner sent another letter to Mr. Ballesteros with reference to marriages by proxy. [Ap. 167-168.]

In answer to that letter Mr. Ballesteros, on January 31, 1946, wrote a letter to the deputy commissioner making it very clear that the law of the State of Chihuahua did not authorize proxy marriages until sometime later than the year 1926 and that proxy marriages were not governed by any law nor permitted by any state of Mexico to be valid and recognized prior to or in August 1926. [Ap. 173-174.]

From the evidence and proceedings before the deputy commissioner it is quite clear that the claimant is not a surviving wife of Walter Olcott. The appellee relied upon a presumption that the claimant had contracted a valid marriage simply because she lived with the deceased. Presumptions must be ignored if substantial contrary evidence is introduced. (*New Amsterdam etc. v. Hoage,* 46 F. (2d) 837; *Delvecchio v. Bowers,* 296 U. S. 280, 80 L. Ed. 229.)

The claimant in this case did not testify to any facts from which it could be inferred, in view of the evidence showing the law of Mexico with reference to marriage, that there was any ceremony performed by any person having authority to do so in accordance with the requirements.

In the case of *Bolin v. Marshall,* 76 F. (2d) 668, this Court decided that whether or not the claimant involved was the surviving wife of a deceased employee depended upon the application of the law of Oregon and held that the claimant involved in that case was not entitled to an award because she had not proved that she was married in accordance with the law of the State of Oregon.

In the case of *MacArthur v. I. A. C.,* 220 Cal. 142, 29 P. (2d) 846, the claimant relied on a purported common law marriage in Canada. The California Supreme Court held that as the purported marriage was not contracted in accordance with the law of Canada it was invalid and the claimant was not entitled to a death benefit award.

It was conceded by the appellee in the court below that the case does not involve common-law status nor the validity of common-law marriage in California. [Ap. 199.]

> "In those cases in which it is necessary to prove a marriage in fact, as distinguished from a marriage inferred by circumstances, (to wit, a common-law marriage) it must be shown that the person solemnizing the marriage was one having authority to do so, and such authority cannot be proved by his general reputation."
>
> 38 *Corp. Jur.* 1310;
>
> *People v. Spitzer,* 57 Cal. App. 593, 208 Pac. 181.

Presumptions so heavily relied upon by the appellee, have no probative value in a federal court. (*Liberty Mutual Ins. Co. v. Gray,* 137 F. (2d) 926; *Salmon Bay etc. v. Marshall,* 93 F. (2d) 1 and *New York etc. v. Gamer,* 303 U. S. 161.)

The evidence required to support an award must be substantial. (*Bernatowicz v. Nacirema,* 142 F. (2d) 385; *Fireman's Fund v. Peterson,* 120 F. (2d) 547.)

POINT II.

The Judgment of the District Court and Each of Its Rulings as Set Forth in the "Ruling on Motion for a Trial de Novo, and Motion to Set Case for Trial" Signed and Dated January 6, 1948, Are and Each Thereof Is in Contravention of the Fifth Amendment to the Constitution of the United States in That Such Rulings and Each Thereof Deprive Libelants of Their Property Without Due Process of Law.

This point involves a consideration of Assignments of Error VII, VIII and X. [Ap. 226-227.]

It is quite clear from the statements made by the deputy commissioner during the oral proceedings that he was proceeding on the theory that any kind of a purported procedure in Tijuana which the claimant thought was a marriage was sufficient to entitle her to an award. This is made very clear by the record. The deputy commissioner said:

> "I don't wish to try the question of the validity of the purported marriage. . . . The question is open in this proceeding as to whether there was any marriage at all, but not the question of whether a purported marriage may or may not have been valid and in compliance with all formalities." [Ap. 20.]

The deputy commissioner also said:

> "If it is shown to be a fact that the claimant and Mr. Olcott did go to some Mexican office to a place wherein people were getting married and did go through some form of marriage and that she was given a certificate of marriage, then I would not assume jurisdiction here to determine whether those formalities sufficiently complied with Mexican law.

> That question is one which should come up, if at all, in proceedings to annual (sic) a marriage, and which is matter for the courts. In so far as there may be a contention, if there is one, that she did not go to Tijuana, did not go to any person, that there was no effort to have the marriage made, that question would be open and you could offer evidence on that." [Ap 22.]

The Fifth Amendment to the Constitution of the United States is directly involved and it is the contention of the appellants that the refusal of the deputy commissioner and the lower court to require the claimant to show a legal marriage has deprived appellants of their property without due process of law. The elementary principles require a full and fair hearing and a decision with reference to every question of fact and law involved in such proceeding. The appellants were not accorded this right.

Conclusion.

It is respectfully contended that the decree of the lower court should be reversed and that a final decree should be entered in favor of appellants setting aside and vacating the compensation order and enjoining the enforcement thereof, or that the court below should be directed to conduct a trial *de novo* on the issue of marriage.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellants.